UNITED OVERSEAS BANK (M) BHD

v.

ISLAND PALM TRADER SDN BHD

HIGH COURT MALAYA, JOHOR BHARU
ABDUL MALIK ISHAK J
[COMPANIES WINDING-UP NO: 28-31-1998]
31 JANUARY 2000

COMPANY LAW: *Winding-up - Debt owed by respondent company - Debt in pursuance of contract between petitioner and company - Whether such contract enforceable - Whether winding-up justified - Companies Act 1965, ss. 20, 218*

The respondent was incorporated under the Companies Act 1965. The respondent was indebted to the petitioner in the sum of RM9,457,528.70. The debt arose out of foreign exchange losses suffered by the petitioner consequent upon the cancellation of forex contracts on the instructions of the respondent. The petitioner prayed for an order that the respondent be wound-up by the court under the Companies Act 1965. An affidavit was filed by the managing director of the respondent ('Yeo') who stated that the affidavit verifying the petition was not in order as it had not complied with the requirements of rule of the Companies (Winding-Up Rules) 1972. On the basis that this objection was not accepted, Yeo went on to state that the contract between the respondent and petitioner was illegal and/or unenforceable and therefore the respondent was not legally bound to pay the debt as such debt was unenforceable.

Held:

[1] It was in the ordinary course of the petitioner's business as a bank to provide forex facilities to its clients including the respondent. It was also the petitioner's business enterprise as a bank to enter into 'forward foreign exchange contracts' with its business customers including the respondent in the present case, to enable the customers, which must necessarily include the respondent, to hedge their foreign currency exposure arising from the export/import trade.

[1a] All forward foreign exchange contracts were initiated by the respondent. When the respondent cancelled the forward foreign exchange contracts the petitioner suffered foreign exchange losses on a massive scale.

[2] The presumption of insolvency arises when the requirements of s. 218(2)(a) of the Companies Act 1965 have been satisfied and it is for the company to prove that it is able to pay its debts. The question is not whether the debtor would be able, if time was given to him, to pay his debts out of his assets, but whether he is presently able to do so with monies actually available.

[2a] The debt incurred by the respondent was admitted and the proposal by the respondent to pay the debt at RM40,000 per month and that the respondent would increase that monthly repayment once the situation improved was not acceptable to the petitioner. The respondent therefore satisfied the test of commercial insolvency.

[3] Section 20(1) of the Companies Act 1965 provides that no act or purported act of a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act. The section abolishes the absolute effect of the *ultra vires* doctrine.

[3a] The facts revealed that it was the respondent who was interested in concluding the forward foreign exchange contracts and the petitioner therefore should not be faulted. Therefore, even if the forward foreign exchange contracts were transacted without the permission of the relevant authorities within the ambit of the Bank Negara Malaysia Exchange Control Regulations, it was an irrelevant consideration and the demand for the repayment of a debt due was not defeated by the absence of such permission.

[Petition granted.]

Case(s) referred to:

Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 ***(refd)***

Bumiputra Merchant Bankers Bhd v. Supreme-QBE Insurance Bhd [1990] 2 MLJ 247 ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424 ***(refd)***

In re British American Continental Bank, Goldzieher & Peso's Claim [1922] 2 Ch 575 ***(refd)***

In re British American Continental Bank Ltd Lisser and Rosenkranz's Claim [1923] 1 Ch 276 ***(refd)***

Lloyd v. Citicorp Australia Ltd [1986] 11 NSWLR 286 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1987] 1 MLJ 39 ***(refd)***

Pioneer Concrete (M) Sdn Bhd v. Celini Corp Sdn Bhd [1999] 5 CLJ 145 ***(foll)***

Pt Anekapangan Dwitama v. Far East Food Industries Sdn Bhd [1994] 3 AMR 2682 ***(foll)***

Re Hong Huat Realty (M) Sdn Bhd United Asian Bank Bhd v. Hong Huat Realty (M) Sdn Bhd [1987] 2 MLJ 502 ***(refd)***
Re NKM Holdings Sdn Bhd [1985] 2 MLJ 390 ***(foll)***
Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v. Official Receiver And Liquidator Of Mosbert Acceptance Ltd [1978] 1 MLJ 57 ***(foll)***
Re Tan Swee Hong Elaine, ex p Deutsche Bank AG (formerly known as Deutsche Bank (Asia) AG and also formerly known as European Asian Bank AG) [1994] 3 CLJ 371 ***(foll)***
Re Vaportec International Pty Ltd; Re Parktec International Pty Ltd [1994] 12 ACLC 123 ***(refd)***
Richard v. American Union Bank [1930] 253 NY 166 ***(refd)***
Shoreline Currencies (Aust) Pty Ltd v. Corporate Affairs Commission (NSW) [1986] 10 ACLC 8408 ***(foll)***
Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637 ***(foll)***
Teck Yow Brothers Hand-Bag Trading Co v. Maharani Supermarket Sdn Bhd [1989] 1 CLJ 258 ***(refd)***
Wilson, Smithett and Cope Ltd v. Terruzzi [1976] 2 WLR 418 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 20(1), 217, 218(1)(e), (2)(a), 221(2)(b)
Companies (Consolidation) Act 1908, s. 214
Companies (Winding-Up) Rules 1972, rr. 26, 32(1), 194(1)
Exchange Control Act 1953, ss. 3, 5

Other source(s) referred to:
RD Lucia and J Peters, *Commercial Bank Management: Functions and Objectives*, 1993, 3rd edn, pp 176, 178

For the petitioner - Goh Mey Foon; M/s Leng & Co
For the respondent - Michael Tan Lip Yip (Salbiah Mahalil); M/s Tan Lip Yip & Co

Reported by Mariette Peters-Goh

JUDGMENT

Abdul Malik Ishak J:

The Detailed Facts

The respondent, Island Palm Trader Sdn Bhd, was incorporated on 5 December 1987 as a limited company under the Companies Act, 1965. The registered office of the respondent was stated to be at no: 2C, Jalan Giam, Taman Majidee, 80250 Johor Bahru, Johore. The authorised capital of the respondent was said to be RM2 million divided into 2,000,000 shares of RM1 each; while the amount of capital paid up or credited as being paid up was said to be RM1.5 million. The objects for which the respondent was established were said to be for the following purposes:

(1) To carry on the business of importers and exporters, wholesale and retail dealers in and merchants of palm oil, palm fruits and kernel, cocoa, maize, coconut fibre, copra, tea, coffee and dealers in all kinds and every descriptions of produce of the soil, and to prepare, manufacture and render marketable any such produce, and to sell, dispose of and deal in any such produce either in its raw state or as prepared or manufactured.

(2) To acquire, take over, promote, establish, and carry on all or any of the business of seed kernel crushers and manufacturers of linseed cotton oil palm and other cakes, oil extractors by crushing, chemical or any other processes; and other objects set forth in the Memorandum of Association thereof.

Now, the respondent was indebted to the petitioner, United Overseas Bank (Malaysia) Bhd, in the sum of RM9,457,528.70 which excluded the interest sum which the petitioner reserves its right to take other legal action. That debt incurred by the respondent arose out of "foreign exchange losses" suffered by the petitioner consequent upon the cancellation of forex contracts on the instructions of the respondent and that the full particulars thereof have been rendered to the respondent.

Pausing here for a moment, I must highlight s. 218(1)(e) of the Companies Act 1965 which enacts as follows:

(1) The court may order the winding up if –

(e) the company is unable to pay its debts.

By virtue of s. 218(2)(a) of the Companies Act 1965 the respondent shall be deemed to be unable to pay its debts if the respondent "is indebted in a sum exceeding five hundred ringgit." Here, from the available evidence, the debt was indeed colossal: RM9,457,528.70.

Reverting back to the mainstream of the case, the petitioner's solicitors namely, Messrs Leng & Co., had on 3 March 1998 served on the respondent a copy of the statutory notice dated on the same date – meaning 3 March 1998, pursuant to s. 218 of the Companies Act 1965 to the respondent's registered office as alluded to above. Under the statutory notice, the respondent was required to pay the sum of RM9,457,528.70 (excluding the interest sum which the petitioner reserves its right to take other legal action), being "foreign exchange losses" suffered by the petitioner consequent upon the cancellation of "forex contracts" on the instructions of the respondent, within twenty-one (21) days from the receipt of the statutory notice. But alas, no payment was forthcoming from the

respondent since the service of the statutory notice. It was quite apparent that the respondent was unable to pay its debts. In the circumstances, it was the stand of the petitioner that it was just and equitable that the respondent should be wound up. The petitioner then prayed in encl. 2 of prayer 8 for the following orders:

(a) That the respondent may be wound up by the court under the provisions of the Companies Act, 1965.

(b) That the official receiver may be appointed as provisional liquidator of the respondent.

(c) That the petitioner be allowed the costs of and incidental to the winding-up which is to be taxed by the proper officer of the court and be paid by the liquidator out of the assets of the respondent.

(d) Or that such other order may be made in the premises as shall be just.

An affidavit opposing the petition was affirmed by Yeo Sech Yew ("Yeo") on 21 May 1998 which was filed on the same day as seen in encl. 11. Yeo affirmed that affidavit in his capacity as the managing director of the respondent and he deposed that he was authorised by the respondent to make that affidavit and that the facts deposed therein were within his personal knowledge save where otherwise stated. Yeo was advised by his counsel to state that the affidavit verifying the petition was not in order as it had not complied with the requirements of r. 26 of the Companies (Winding-Up) Rules 1972 and for that reason he deposed that the affidavit was not *prima facie* evidence of the statement in the petition. As this was an objection on a point of law, Yeo deposed that his counsel will submit at the hearing of the petition. Yeo too deposed that on this point alone, if that point was true, the petition ought to be struck out with costs. Yeo then deposed that if his objection was not accepted, then he was willing to proceed to answer the allegations in the petition. Yeo raised the following points:

(1) That the sole ground for the petition was the failure of the respondent to comply with the petitioner's notice of demand under s. 218 of the Companies Act 1965 to pay the sum of RM9,457,528.70 being foreign exchange losses suffered by the petitioner within 21 days from the service of the notice of which the respondent disputed the debt. If at all there was a contract, the contract was illegal and/or unenforceable as the alleged losses arose from speculative dealings on foreign exchange and it also contravened the objects for which the respondent was established as alluded to earlier. That being the case, it was deposed that the contract was void against the respondent and unenforceable. Flowing from that it was deposed that:

(a) the statutory notice issued by Messrs Leng & Co was of no legal effect and this would be so even if the service of the statutory notice was good in law;

(b) it was not true that the respondent was unable to pay its debts and the respondent was only legally obliged to pay a legally enforceable debt; and

(c) under undue influence and threat by the petitioner to blacklist the respondent and Yeo and to circulate that blacklist to the other banks, Yeo was said to have signed a guarantee of RM10 million prepared by the petitioner to guarantee the payment of the amount which was the claim under the statutory notice under s. 218 of the Companies Act 1965 and as alluded to in the petition.

On the issue of duress, Yeo in his capacity as the managing director of the respondent wrote a letter to the manager of the petitioner dated 9 January 1998 and Yeo conveyed the following message (see exh. "YSY1" of encl. 11):

RE: THE GUARANTEE THAT I WAS FORCED TO SIGN

I refer to the Personal Guarantee signed by me on 02/01/98.

This guarantee is in respect of the sum of money allegedly due to you from Island Palm Trader Sdn Bhd.

I now write to inform you that I had signed this guarantee under duress from your officer. I also was not told and fully explained the content of this said guarantee.

Furthermore, I was actually forced to sign it under great pressure.

Furthermore, I was not given an opportunity to get any legal advice before signing it.

Actually, I was hurried into signing it. Your officers came into my office on 02/01/98 and they stayed there for about an hour or so. Four of your officers have come to see me.

In any event, I now write to inform you that I do not wish to carry on as the guarantor. Please therefore note that I am withdrawing myself as (a) guarantor.

I trust that you will do what needs to be done in the circumstances.

Thank you.

The petitioner through its solicitors, Messrs Leng & Co, responded by letter dated 23 February 1998 to Yeo at Yeo's address at no: 17, Jalan Permas 10/1, Bandar Baru Permas Jaya, 81750 Johor Bahru and this letter can be seen at exh. "YSY2" of encl. 11 and it was worded as follows:

Re: Claim by United Overseas Bank (Malaysia) Bhd.

Against

(1) Borrower : Island Palm Trader Sdn. Bhd.

(2) Guarantor "Yeo Sech Yew"

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1. We refer to our letter of demand issued on behalf of United Overseas Bank (Malaysia) Bhd. which was served on you at 4.30 pm, 6 February 1998.

2. We also refer to your letter of 9 January 1998 which was received by our client via facsimile transmission at about 5.17pm on 6 February 1998 though the time as appeared on the letter received by our client via facsimile transmission is 14.33. However, the facsimile number used by you in transmitting the aforesaid letter did not appear on our client's activity report.

3. We are instructed that the original copy of your aforesaid letter was hand-delivered by your staff to the secretary of our client's branch manager at about 5pm, 6 February 1998 in a sealed envelope though the letter was dated 9 January 1998.

4. Our client categorically denies that the guarantee executed by you on 2 January 1998 was executed under duress or that you were not avail of opportunity or time to seek independent legal advice.

5. We are further instructed that on the day in question, 3 officers from our client, namely, Mr. Khoo Wah Sun, Mr. Henry Hew Sun Kong and Mr. Michael Beh, called on you in the morning to be briefed on your export shipments and the forex contracts.

6. As you offered to execute the personal guarantee for a principal sum not exceeding RM10 million for covering the forex losses that our client would suffer consequent upon the cancellation of forex contracts as requested by the Borrower, Mr. Henry Hew alone came back later with our client's standard letter of guarantee which you executed willingly. At no time any pressure was applied on you by our client's officers or any of them on your provision of the said guarantee.

In short, the allegations by Yeo of duress and being forced to sign the guarantee "under great pressure" were rebutted point by point.

Yeo then proceeded to depose that the petitioner had accepted his personal guarantee in consideration of the petitioner withholding legal action namely, not to proceed with the winding-up proceedings against the respondent. Yeo deposed that if his personal guarantee was not accepted then the petitioner was estopped from relying on the letter of guarantee which was signed under the circumstances as alluded to in the letter marked "YSY1" of encl. 11. Yeo deposed that it was for these compelling reasons that he had signed the letter of guarantee which was prepared by the petitioner's

servant or agent. Yeo then deposed that if there was a debt it was in the nature of a contingent debt coming within the purview of s. 217 of the Companies Act 1965. For these reasons, Yeo prayed that the petition in encl. 2 be dismissed with costs.

Khoo Wah Sun ("Khoo"), the branch manager of the petitioner, affirmed an affidavit in reply on 25 May 1998 which was filed on the same date as seen in encl. 13. Khoo deposed that he was authorised by the petitioner to make this affidavit on its behalf and he too deposed that the facts stated therein were within his personal knowledge save where otherwise stated. Khoo was advised and he verily believed that the respondent's contention that the affidavit verifying the petition was not in order was not true and unsubstantiated. Khoo deposed that he had been informed by his solicitors that:

(a) the winding up petition was presented against the respondent on 25 March 1998; and

(b) the affidavit verifying petition affirmed by Khoo on 27 March 1998 was filed in this court on 28 March 1998 as reflected in exh. 'A' of encl. 13.

Khoo deposed that he is the senior manager and principal officer of the petition and he too is the first vice president and branch manager of the petitioner's branch in Johor Bahru. Khoo deposed that the petitioner denied the respondent's allegations that the "forward foreign exchange contracts" were:

(1) illegal;

(2) unenforceable;

(3) speculative dealings; and

(4) contravened the respondent's objects.

It was deposed that it was in the ordinary course of the petitioner's business to provide forex facilities to its customers and to enter into "forward foreign exchange contracts" with its customers so as to enable the customers to "hedge" their foreign currency exposure arising from their export/import trade. It was also deposed that at all material times, the respondent remained a trading company which was involved in the purchase of palm kernel expeller, copra cake, cocoa and other local products for overseas export. In order to hedge the respondent's foreign currency exposure against currency fluctuations in respect of the respondent's

expected export proceeds, which would be received from the respondent's overseas purchasers in foreign currency, the respondent had entered into various forward buying contracts with the petitioner. It was deposed that all "forward foreign exchange contracts" were initiated by the respondent.

The petitioner's stand was quite simple. The petitioner denied that the "forward foreign exchange contracts" were speculative dealings and that the petitioner had no reason whatsoever to suspect that the "forward foreign exchange contracts" were speculative dealings. The petitioner relied on the respondent's audited accounts as at 31 July 1996 and the draft management accounts as at 31 July 1997, both of which were furnished by the respondent to the petitioner, which showed that the sales volumes were RM41,072,887 and RM39,423,759.84 respectively (see the respondent's audited accounts and the draft management accounts annexed and collectively marked as exhibit "C" of encl. 13) and this was solely done to rebut the allegations by the respondent that the "forward foreign exchange contracts" were speculative dealings. Proceeding further in its rebuttal, the petitioner exhibited the following letters:

(a) a letter dated 27 October 1997 emanating from the respondent to the petitioner which clearly showed the respondent's sale contracts; this very letter was exhibited as exh. D at p. 22 of encl. 13 and it was worded thus:

Dear Sir,

Enclosed herewith are the photocopies details of sale transactions for supporting the Forex Contracts which we have contracted for your reference.

Sale Contract	Amount/USD	Forex Contract No	Amount /USD
26/8/96	525,000.00	265200 (Balance)	143,529.64
08/9/96	525,000.00	269768	500,000.00
21/4/97	512,000.00	354845	500,000.00
27/4/97	512,000.00	357439	500,000.00
5/5/97	495,000.00	360654	500,000.00
13/5/97	518,000.00	363104	500,000.00
27/5/97	495,000.00	67609	500,000.00
23/6/97	990,000.00	2007800	1,000,000.00
27/6/97	495,000.00	2010598	500,000.00
30/6/97	1,980,000.00	2013942	500,000.00
30/6/97	/	2019458	500,000.00
30/6/97	/	2029510	1,000,000.00
14/8/97	495,000.00	2043046	500,000.00
	7,542,000.00		7,143,529.64
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(b) (i) a letter dated 16 October 1997 emanating from the respondent to Bank Negara Malaysia requiring extension of the forex contracts and this letter was exhibited as exh. D at p. 34 of encl. 13 and it was drafted in this manner:

Re: Extension of Forex Contracts Due

Please be informed that in Germany and Holland due to the EL-NINO effect, the water level in the usual transport canal in Germany and Holland is very much lower now. Thus the barges cannot enter to the factories therefore the overseas buyers of our product did not send vessel to collect our cargoes here. Frankly speaking, we don't know when this effect will be over and because of this reason our sale proceed will be delayed also. We hereby request you to allow us to extend another 3 months from now for those existing forex contracts that (are) already due.
We enclose herewith the photocopies of the relevant contract(s) that (are) already due as follows for your reference.

NO	CONTRACT NO	AMOUNT/USD	RATE	DUE DATE
1)	265200	216,978-32	2.5259	15/10/1997
2)	2063055	500,000-00	2.5281	15/10/1997

We hope to receive your favourable reply as soon as possible and your kind approval and attention to this matter is greatly appreciated.

(ii) a letter dated 12 November 1997 from the respondent to the petitioner as seen in exh. D at p. 35 of encl. 13 and it was worded in this way:

RE: EXTENSION OF FOREX CONTRACTS WHICH ARE DUE

With reference to the telephone conversation between your Ms. Chan and our Ms. Carrie, regarding the abovementioned matter, please be informed that due to congestion of cargoes in our overseas buyer's godown and also the low water level in the transporting canal, the shipment in Pasir Gudang still uncertain therefore we have no other alternative but to request your bank to allow us to extend the Forex Contracts which are due for another six months.

For your information, Maybank had already allowed us to extend all the due contracts for the same period.

Should you need any other information or documents please contact Ms. Carrie or Mr. Yew.

Thank you in anticipation.

Khoo deposed further to the effect that the aggregate sums of RM9,457,528.70 as demanded in the s. 218 notice dated 3 March 1998 which notice was also alluded to in the petition was in relation to the foreign exchange losses suffered by the petitioner consequent upon the cancellation of the "forward foreign exchange contracts" at the request of the respondent. Of significance would be the damning fact that the respondent itself had admitted owing the petitioner the principal sum of RM9,457,528.70. For this exercise, I must reproduce two letters. One letter dated 12 January 1998 from the petitioner to the respondent as seen at exh. "E" of encl. 13 at p. 41 and it was worded in this fashion:

> **RE: SETTLEMENT OF LOSSES ARISING FROM CANCELLATION OF FOREX CONTRACTS**
>
> Following the meeting on 6th January 1998 between your Mr. Yeo Sech Yew and Mr. Yew Her Kiu, and the Bank's officers, Mr. Huang Soon Ngak, Mr. Khoo Wah Sun, Mr. Henry Hew and Mr. Michael Beh, and the subsequent telephone conversation between your Mr. Yeo Sech Yew and Mr. Khoo Wah Sun on 9th January 1998 wherein you proposed a payment of RM40,000 a month to cover the losses of approximately RM9,457,528.70 arising from the cancellation of various forex contracts, we regret to say that we are unable to accede to your proposal of a relatively small monthly payment sum.
>
> The Bank has considered your situation and request that you now make an upfront payment of RM5 million within seven (7) days from the date of this letter as well as a monthly payment of RM500,000 per month until full settlement of the losses incurred as mentioned in the preceding paragraph, including interest and charges payable. In addition thereto, we request that you procure Madam Lee Kin Choi and Madam Ho Yoke Kheen to execute a personal guarantee each for RM10 million to guarantee the payment by the company of the losses incurred. The personal guarantee which Mr. Yeo Sech Yew has earlier executed on 2nd January 1998 for the same purpose is acceptable and has been accepted by the Bank.
>
> Please, therefore adhere to the request made by the Bank, failing which, we may have no option but to proceed with whatever legal action necessary to recover the amount due to the Bank.

The other letter dated 16 January 1998 from the respondent to the petitioner as reflected at exh. E of encl. 13 at p. 42 and it is this very letter that tied the neck of the respondent to the noose, so to speak. It was, pure and simple, a letter of admission and it was worded in this way:

RE: REPAYMENT OF FOREX CONTRACTS LOSSES

With reference to your letter dated 12/01/98 and our meeting in our office on 13/01/98 regarding the abovementioned matter.

Please be informed that during our previous meeting we had explained to your Mr. Huang and yourself that at this very difficult moment, we hope your bank will accept our proposal of RM40,000-00 per month for half a year without any upfront payment, later when the situation improves gradually, we shall increase our monthly repayment.

Furthermore, as you are aware, the unexpected weakening of ringgit (which) resulted (in) the great losses incurred for cancellation of Forex Contracts were actually out of your banks and also our control, we should co-operate with each other to solve the matter and the only way is to let our business to carry on as usual and when the EL-NINO effect is over and when ringgit is strengthening gradually we are able and confident to recover the losses in a few years time.

Moreover, Madam Lee Kin Choi and Madam Ho Yoke Kheen are not and have never been directly or indirectly involved in the Forex deal, thus they have refused to sign the guarantee, we hope your bank will accede to the request to leave them out.

Finally, we wish to stress that we have been and now are the biggest exporter of PKC in Malaysia.

We need your bank continuing support so that we can repay back the losses as soon as possible, or else many of the PKC suppliers who depend on us for survival will be greatly affected and the chain reaction will cause many millers to go down. Eventually Malaysia's economy will also be severely affected.

Thank you in anticipation.

The allegations that the petitioner had exerted undue influence and threatened to blacklist the respondent were denied by the petitioner. In regard to the issue of personal guarantee as advanced by Yeo, it was deposed that that would be irrelevant in considering the petition. The petitioner denied the respondent's allegation that the personal guarantee was executed and accepted on the basis that the petitioner would withhold winding-up proceedings against the respondent. It was deposed that this was not the intention of the petitioner and that this issue was never raised by the respondent nor by Yeo until the matter was alleged in the respondent's affidavit. The petitioner also denied that the personal guarantee was signed under the circumstances as set out in the letter marked "YSY1" of encl. 11 which had been reproduced earlier. In regard to the debt to the tune of RM9,457,528.70, the petitioner held the view that it was an actual loss and not contingent loss as alleged. That sum was said to be incurred by the

petitioner consequent upon the respondent's non-performance of its obligations under the "forward foreign exchange contracts" and the resulting cancellation of the same by the petitioner at the request of the respondent. In the circumstances, the petitioner sought for the orders in terms of the prayers in the petition.

Yeo responded to encl. 13, and he affirmed an affidavit-in-reply on 29 May 1998 which was also filed on the same date as seen in encl. 16. Yeo deposed that the objects of the respondent did not authorise any of its directors to enter into foreign exchange controls such as forward selling US dollars when the respondent did not have the foreign currencies and under Bank Negara Malaysia Exchange Control Regulations, only designated banks stipulated therein were allowed to have foreign currency account and their amount at any time was subject to the limits as stated therein. To support Yeo's contention, a Bank Negara Malaysia Exchange Control Notices marked as exh. "YSY1" of encl. 16 was exhibited therein. Yeo deposed further that even if the petitioner was an authorised dealer, he was advised to say that the petitioner had not complied with the requirements stipulated under the category of "Contracts Of Authorised Dealers". Yeo was advised to say that it was for the petitioner to satisfy the court that it had complied with all the requirements of Bank Negara Malaysia Exchange Control Regulations published in the Bank Negara Malaysia Exchange Control Notices before any "foreign exchange control" was legally enforceable. All these, he said, required enquiries. Yeo was further advised to say that only designated banks and authorised dealers who comply with the requirements of Bank Negara Malaysia Exchange Control Notices could engage in any dealings pertaining to actual foreign currencies. It seemed, according to Yeo, that the purpose of such "foreign exchange control" was to centralise the holdings of all foreign currencies in Bank Negara Malaysia and not for the purpose, as alluded to by the petitioner, of allowing the customers to hedge the foreign currency exposure which was entirely speculative in nature. It was deposed that any transaction that did not fall within the objects of the respondent unless authorised by the respondent's resolutions in accordance with the requirements of the law, was *ultra vires* the respondent and will not be enforceable against the respondent.

Yeo deposed that the respondent had disputed the sum as alleged by the petitioner as due and owing. The respondent too, it was said, challenged the validity of the contract. Yeo further deposed that the notice under s. 218 of the Companies Act 1965 cannot form a basis for the winding-up petition. It was deposed that the petitioner gave their assurance that the respondent will be allowed to settle the foreign exchange losses by

instalments of an amount within the financial capacity of the respondent and such payment was to be guaranteed by a personal guarantee of Yeo in the sum of RM10 million. Yeo deposed that he was induced to sign on the advice and assurance of the petitioner and their agent that the petitioner would withhold winding-up proceedings against the respondent and that the letter of guarantee for RM10 million was intended for that purpose. Otherwise, so deposed Yeo, he would not have signed the guarantee for RM10 million when he was only liable in the first place by virtue of the first letter of guarantee for a sum of RM1 million only. In regard to the quantum of the debt which the respondent had to pay, Yeo deposed that there was no concrete documentary proof that the amount claimed was the actual loss suffered by the petitioner. According to Yeo, the petitioner unilaterally calculated the quantum according to the market prices chosen by them. Yeo deposed that the matter and the issues have to be fully investigated and adjudicated by the court. Yeo also deposed that it was unjust and unfair for the winding up order to be made against the respondent since the livelihood of many people will be affected by it. For these reasons, Yeo prayed that the petition be dismissed with costs.

In response, Khoo affirmed an affidavit in reply to that of encl. 16 and this can be seen in encl. 18 which was affirmed on 4 June 1998 and filed on 5 June 1998. Khoo denied the allegations as contained in para. 3 of encl. 16 and he categorically stated as follows:

(a) That he was advised and he verily believed that the allegation that the objects of the respondent did not authorise its directors to enter into "forward selling dealings" was irrelevant in deciding whether the respondent should be wound up.

(b) That the petitioner, while dealing in good faith with the respondent, had no knowledge nor reason to suspect any irregularities or lack of capacity or powers on the part of the respondent's directors. Since the respondent was involved in export trade, with its export proceeds in foreign currency, it was only normal for the respondent to "hedge" its foreign currency exposure by entering into "forward foreign exchange contracts". The petitioner averred that such "hedging" formed part of the ordinary course of business of the respondent.

(c) That he was advised and he verily believed that the contentions on foreign currency account and designated banks were entirely irrelevant. In any event, the respondent did not maintain any foreign currency account with the petitioner.

(d) In regard to the issue of the non-compliance of the requests under "Contracts of Authorised Dealers", he stated that the respondent had failed to particularise and substantiate the alleged non-compliance.

The petitioner contended that there was no breach of the Bank Negara Malaysia Exchange Control Regulations occasioned by the petitioner and that the petitioner was, at all times, satisfied that the respondent was due to receive foreign currency from its export sales. Khoo was advised and he verily believed that foreign currency accounts and "forward foreign exchange contracts" were two entirely different issues. Based on the petitioner's knowledge and information gathered from the respondent, the respondent had at all material times been engaged in the business of exporting palm kernel expeller and other local products to its overseas customers. It was not a banking practice nor a pre-requisite for the petitioner to require the respondent to furnish the petitioner with documentary evidence on the purchaser's confirmation on purchase before a "forward foreign exchange contracts" can be concluded with the respondent. It was deposed that the petitioner was satisfied, at all material times, that the respondent was due to receive foreign currency from its export trade.

The petitioner held the view that the amount claimed in the s. 218 notice and the validity of the "forward foreign exchange contracts" entered into between the petitioner and the respondent were not disputed.

Khoo denied para. 9 of encl. 16 and he deposed that:

(a) The RM10 million guarantee by Yeo was furnished as a result of the respondent's request to cancel the "forward foreign exchange contracts" including those which had not matured.

(b) The respondent informed the petitioner that the decision to cancel the "forward foreign exchange contracts" regardless of their respective maturity dates was because the respondent's European buyers would not be taking delivery of their orders and this meant that the respondent's export proceeds could not materialise.

(c) In order to reduce further losses incurred by the respondent and in consideration of Yeo agreeing to be personally liable for all foreign exchange losses consequent upon the cancellation of the "forward foreign exchange contracts", the petitioner was quite magnanimous and acceded to the respondent's request for cancellation.

(d) The petitioner denied that the "forward foreign exchange contracts" were cancelled on the petitioner's assurance that the respondent would be allowed to settle the foreign exchange losses by instalments each of an amount within the financial capacity of the respondent. In fact, so it was deposed, that what the petitioner agreed to was to consider the respondent's proposal to pay the exchange losses by instalments.

(e) The petitioner had requested the respondent to clarify in writing that Yeo's RM10 million guarantee would cover all losses under the "forward foreign exchange contracts".

(f) The respondent sought the help of the petitioner when the respondent requested the petitioner to assist the respondent in drafting the clarification letter and a draft was then prepared and sent to the respondent.

(g) It was only after the cancellation of the "forward foreign exchange contracts" that the petitioner considered the respondent's request to pay the foreign exchange losses by way of instalments. But unfortunately, no agreement was reached between the parties because the respondent's proposal to pay RM40,000 per month was totally unrealistic against the exchange losses of RM9,457,528.70.

(h) In regard to the RM1 million guarantee that Yeo gave, it was as security for the following facilities granted to the respondent:

(i) Bankers acceptance.

(ii) Export credit refinance/pre-shipment.

(iii) Bills of exchange purchased under letter of credit.

Whereas the RM10 million guarantee given by Yeo was executed specifically to guarantee the payment by the respondent of the exchange losses that were incurred.

The petitioner categorically stated that the exchange losses of RM9,457,528.70 were never disputed by the respondent. Indeed the respondent had acknowledged such losses and even proposed to pay the debt by way of monthly instalments. In regard to the respondent's allegation that the losses were incurred as a result of the petitioner's unilateral action of marking according to the market prices chosen by the petitioner, the petitioner verily believed that such an allegation was levelled against Hong Leong Bank Berhad and not the present petitioner. Finally, Khoo deposed that the respondent was insolvent and was indeed unable to pay its debts. For these reasons, the petitioner then prayed for an order in terms of prayer 8, paras. (a), (b) and (c) of encl. 2.

Arduous Route – The Facts And The Law Examined

I have purposely taken an arduous course. It was a time consuming exercise. But in the interest of justice, this course of action must be undertaken.

There was a chequered history before the petition finally came up for hearing. On 1 June 1998, the petition was adjourned to enable affidavits to be filed. On 26 June 1998, even though Madam Goh Mey Foon for the petitioner insisted that the petition should be heard, yet Mr. Michael Tan Lip Yip for the respondent preferred to take another date as he said he was from Malacca and in the end he prayed for an adjournment of the hearing of the petition. On 2 July 1998, Mr. Michael Tan Lip Yip was more blunt when he requested that the petition in encl. 2 be struck off with costs. He said that the petitioner could still resort to a second bite of the apple. He pointed out that the advertisement appeared only once in the local press and he cited and relied on the following two authorities:

(1) *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 SC, a decision of Seah SCJ who delivered the judgment of the Supreme Court;

(2) *Teck Yow Brothers Hand-Bag Trading Company v. Maharani Supermarket Sdn Bhd* [1989] 1 CLJ 258, a decision of Abu Mansor J (now FCJ).

It is germane to point out the decision of Seah SCJ in *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd (supra)* arose by way of an appeal from the decision of George J in *Re NKM Holdings Sdn Bhd* [1985] 2 MLJ 390. George J in *Re NKM Holdings Sdn Bhd (supra)* regarded the need to advertise in the Gazette as an anachronism, and he dispensed with the need to advertise in the Gazette or in the newspapers. At p. 391 of the report, George J remarked:

> I agree with Encik Davidson that the need to gazette has indeed deteriorated into a mere formality and in the face of the existence of widely circulated daily newspapers has perhaps become an anachronism.

and Seah SCJ agreed with the decision of George J In *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd (supra)* at p. 39 of the report, Seah SCJ aptly said:

> We dismissed the appeal as we were satisfied that the learned judge had properly exercised his discretion in dispensing with the advertisements either in the Gazette or in the newspapers of a new date for the hearing of a winding-up petition on the facts of this particular case.

In *Teck Yow Brothers Hand-Bag Trading Company v. Maharani Supermarket Sdn Bhd (supra)*, Abu Mansor J (now FCJ), followed George J in *Re NKM Holdings Sdn Bhd (supra)* and his Lordship Abu Mansor J (now FCJ) held that it was sufficient publication for the petitioner to publish in the Gazette and once in the two local newspapers. This was what his Lordship Abu Mansor J (now FCJ) said at p. 260 of the report:

> As regards the allegation that the petitioner failed to comply with rule 24 of the Winding-Up Rules as to publication in the gazette and two local newspapers, I find that the petitioner has published in the gazette and once in two local newspapers and this was sufficient publication applying the case of *Re NKM Holdings Sdn Bhd* [1985] 2 MLJ 390.

With respect, Mr. Michael Tan Lip Yip was merely stirring a storm in the tea cup. In an affidavit in encl. 8 that was affirmed by Madam Goh Mey Foon on 14 May 1998, she deposed that as required under r. 32(1) of the Companies (Winding-Up) Rules 1972, her law firm have duly performed the following acts (I shall reproduce only two of them here):

> (a) the advertisement of petition was duly advertised in one insertion each in the Malaysian editions of the Star on 13 May 1998 and Sin Chew Jit Poh on 14 May 1998 (see exhibits "A" and "B" of enclosure 8 for the newspaper cuttings).
>
> (b) The petition was duly gazetted on 7 May 1998 under Legal Notice No: 3582 page 5854 of the Government Gazette (see exhibit 'C' of enclosure 8 for a copy of the Gazette notification).

Again in encl. 19, Khoo affirmed an affidavit on 30 June 1998 and it alluded to the advertisements in the local newspapers where at para. 3 thereof Khoo deposed that:

> In addition to the advertisement of the petition in the Malaysian editions of the Star (on 13.5.1998) and Sin Chew Jit Poh (on 14.5.1998), the advertisement of the petition was also advertised in one (1) insertion each in The New Straits Times (on 14.5.1998) and Nanyang Siang Pow (on 13.5.1998). I annex hereto photocopies of the newspaper cuttings marked collectively 'KWS1'.

By way of a summary, the winding-up petition was advertised on four occasions in the local newspapers:

(1) Star on 13 May 1998;

(2) Sin Chew Jit Poh on 14 May 1998;

(3) New Straits Times on 14 May 1998; and

(4) Nanyang Siang Pau on 13 May 1998.

and surely that would be sufficient compliance with the law. Incidentally, s. 221(2)(b) of the Companies Act 1965 gives this court the power to dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the court. This must also be read with r. 194(1) of the Companies (Winding-Up) Rules 1972 which reads as follows:

> No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

In the context of the present case, there was no necessity to resort to these curable provisions as the winding-up petitions have been advertised in the local newspapers on four occasions. The question of substantial injustice as alluded to in *Re Vaportec International Pty Ltd; Re Parktec International Pty Ltd* [1994] 12 ACLC 123 by Ryan J has no relevance at all. Be that as it may, Mr. Michael Tan Lip Yip assisted by Madam Salbiyah bt Mahalil craved for an adjournment and this was what he said (see p. 10 of the notes of evidence):

> I need an adjournment to ask the Minister of Finance to intercede. One mistake made by the respondent. Court must take cognisance of the sensitivity of the case. I need 3 months' adjournment.
>
> Enclosure 13 page 42 (referring to the letter of admission in exhibit marked 'E' as reproduced earlier) – the biggest exporter of PKC – Palm Kernel Cake. A company who has built up for 15 years – not in the interest of the bank to see the company go down.

In regard to the affidavit affirmed by Khoo as seen in encl. 19, Mr. Michael Tan Lip Yip took exception to it and he submitted that Khoo as a bank manager had no personal knowledge or was not responsible for publishing the advertisement. In rebuttal, Madam Goh Mey Foon rightly pointed out that there was no affidavit in rebuttal challenging the averments of Khoo in encl. 19 and that would mean that this court must accept encl. 19, lock, stock and barrel (*Abdul Razak bin Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339; and *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609).

Madam Goh Mey Foon too was not happy with the request for an adjournment. She emphasised that the debt had come up to RM9,457,528.70 and that there were other supporting creditors as seen in encl. 17, namely:

(1) Multi Purpose Bank Berhad in the sum of RM1,495,000 as at 1 April 1998;

(2) Hong Leong Bank Berhad in the sum of RM5,215,398.71 together with interest from 18 February 1998;

(3) Ban Hin Lee Bank Berhad in the sum of RM1,013,835.62 as at 23 May 1998 together with interest; and

(4) Malayan Banking Berhad in the sum of RM13,895,350.92 as at 19 May 1998 together with interest;

The depth of indebtedness of the respondent was indeed mind boggling. It was beyond comprehension.

Madam Goh Mey Foon was correct when she submitted that the respondent's claim of being the biggest exporter of Palm Kernel Cake came from the respondent's own letter as seen in exhibit marked "E" of encl. 13 at p. 42 which had been reproduced earlier. She rightly pointed out that the request for an adjournment was simply meant to delay the court proceedings. She submitted in serious vein as follows (see p. 12 of the notes of evidence):

> We are sympathetic with the position of the respondent. But the petitioner should not be deprived of his remedy afforded by law.

But Mr. Michael Tan Lip Yip in a pleading voice said (see last column at p. 12 of the notes of proceedings):

> Pray for 3 months adjournment. For compassionate reasons. The respondent should be assisted.

and reluctantly, I adjourned the proceedings.

The next date of hearing was on 28 October 1998. On that date, Mr. Michael Tan Lip Yip informed the court of the development of the case and this was what he said (see p. 15 of the notes of proceedings):

> I wrote to Perdana Menteri and Tun Daim and we are still waiting for their reaction (show to court the letter). I believe there is a reply and the reply is not with me. I forgot to bring them.
>
> The reply was brief that they would refer to the recovery department. I leave it to Y.A.

But, in a show of bravado, Mr. Michael Tan Lip Yip sought for an adjournment. He said (see p. 16 of the notes of proceedings):

(1) I got instruction from my client to get another date pending the outcome of our appeal (referring to the appeal to the Prime Minister and Tun Daim).

(2) I have a severe flu (cold), coughing.

Madam Goh Mey Foon objected to the request for an adjournment. She said it was a case where the respondent had admitted its inability to pay the debt of RM9,457,528.70.

Mr. Michael Tan Lip Yip then suggested that Danaharta may assist the respondent. Again, reluctantly this court adjourned the proceedings to 1 April 1999. It was not an April Fool's day because on that day the proceedings got off the ground smoothly.

At the hearing of the petition in encl. 2 on 1 April 1999, Madam Goh Mey Foon emphasised that the respondent was indebted to the petitioner to the tune of RM9,457,528,70 and this was the principal sum excluding interest thereto. It was foreign exchange losses suffered by the petitioner as a result of the cancellation of "forex contracts" on the instructions of the respondent. It was just like the case of *Pioneer Concrete (M) Sdn Bhd v. Celini Corp Sdn Bhd* [1999] 5 CLJ 145, a non-judgment debt. She stressed that the respondent had admitted owing the sum that was due to the petitioner.

I take stock of the situation and I have this to say. It was in the ordinary course of the petitioner's business as a bank to provide forex facilities to its clients including, in the present case, the respondent. It was also the petitioner's business enterprise as a bank to enter into "forward foreign exchange contracts" with its customers including the respondent in the present case, to enable the customers which must necessarily include the respondent to hedge their foreign currency exposure arising from the export/import trade. The respondent was and is a trading company and, at all material times, involved in the purchase of palm kernel expeller, copra cake, cocoa and other local products for export overseas. It was an ongoing concern for the respondent – a business which if managed well would reap bountiful profits. In order to "hedge" the respondent's foreign currency exposure against possible currency fluctuations in respect of the respondent's expected export proceeds, the respondent cleverly devised a scheme wherein the respondent had entered into various forward buying contracts with the petitioner. It must be emphasised that all "forward foreign exchange contracts" were initiated by the respondent. When the respondent cancelled the "forward foreign exchange contracts", the petitioner suffered foreign exchange losses on a massive scale – being the

principal sum of RM9,457,528.70. This was the figure that was arrived at after taking into account the difference between the cancellation rate and the contract rate. The contract rate was the agreed contract rate while the cancellation rates of 3.93 and 3.94 were purely on the instructions of the respondent. This brings to mind the case of *In re British American Continental Bank, Limited Lisser And Rosenkranz's Claim* [1923] 1 Ch 276 and that was the case of a breach of contract to deliver foreign currency and the court held that the measure of damages would be calculated by using the exchange rate at the date of the breach. The facts of that case may be stated as follows. A bank in England ("bank") contracted with the applicants, a German bank, to deliver to the applicants on 31 December 1920, specific amounts of American dollars and English pounds sterling against the delivery to the bank of specific amounts of Swiss francs and German marks. The applicants performed their part of the contract, but the bank failed to deliver either the dollars or the sterling. On 6 January 1921, the bank suspended payment, and on 25 January 1921, a compulsory winding-up order was made and a liquidator was appointed. The applicants in the meantime – namely, on 15 January 1921, in order to put themselves in a position to fulfil their obligations to customers and to minimise their loss, purchased – as it was not disputed they were entitled to do – the American dollars and English sterling against the bank and paid the German marks at the market price prevailing on that day. On May 19, 1921, the applicants at the invitation of the liquidator lodged their proof for a sum of English pounds sterling which represented the German marks converted into English currency at the rate of exchange prevailing on 25 January 1921, the date of the winding-up order. In December 1921, the liquidator, in pursuance of s. 214 of the Companies (Consolidation) Act, 1908 purchased the same number of marks as the applicants had expended in acquiring the undelivered currencies, and on 5 January 1922, in spite of the applicants' proof, tendered that sum of marks to the applicants in full satisfaction of their claim, which tender was refused. Owing to the rapid depreciation of the mark from and after January 1921, the value of the marks converted into English currency at the date of the purchase and tender by the liquidator as compared with their value on 31 December 1920, was approximately in the ratio of 5,000 pounds to 20,000 pounds. Upon the application of the applicants that the liquidator be directed to admit their proof, it was held by P.O. Lawrence J and the Court of Appeal, that the claim was for damages for breach of contract to deliver American dollars and English sterling and not for a debt in German marks, and that on the authority of *In re British American Continental Bank, Goldzieher and Penso's claim* [1922] 2 Ch 575, the applicants were entitled to be admitted as creditors in the winding-up for the value of the marks in

English sterling at the rate of exchange prevailing on 31 December 1920, the date of the breach, and were not bound to accept the tender of the marks made on 5 January 1922. Lord Sterndale M.R. at p. 290 to p. 291 of the report observed that:

> The claim really was in respect of damages for breach of contract to deliver what the bank had agreed to deliver.

Continuing at the same page, the learned judge said:

> It seems to me that the learned judge was quite right (referring to the decision of P.O. Lawrence J.) when he said that 'the purchase by the applicants of the American and English currency against the Bank happens in the present case to have fixed the amount of these damages'.

Further down at the same page and spilling over to p. 292 of the report, Lord Sterndale M.R. had this to say:

> They had fixed the amount of damages by the transaction which took place in Germany, and according to the case to which I have referred, a decision of the Court of Appeal, and according I think also to the decision of the House of Lords on these same points, the date at which the amount is to be ascertained is the date of the breach. Therefore the date at which the German currency which they have expended in order to cover their loss has to be converted into British sterling is also the date of the breach. I think the reasons and the conclusions of P.O. Lawrence J.'s judgment are both right, and it is not necessary to say any more about the case except that I agree with the judgment and think that the appeal should be dismissed with costs.

Now, in the context of the present case the date of the breach would be the date of the cancellation of the forex contracts and that would be on 2 January 1998. Using this date as a barometer, the measure of damages could easily be quantified.

The court in *Richard v. American Union Bank* [1930] 253 NY 166 adopted the same approach as P.O. Lawrence J in the case of *In re British American Continental Bank, Limited Lisser And Rosenkranz's Claim (supra).* In the *Richard*'s case *(supra),* the Supreme Court of New York estimated damages in favour of Richard. Richard had in 1919 paid $72,755 to the bank, a New York foreign exchange dealer, in order to establish a credit in his favour for 2,000,000 Roumanian lei. The bank defaulted and only established the credit in 1921 when the value of the 2,000,000 Roumanian lei had fallen to $24,440. The Supreme Court of New York held that both parties had understood that the foreign currency was purchased for sale as a commodity in New York and awarded Richard

damages in the sum of $48,315.00. This was the sum which the Supreme Court of New York held to be the difference in value of the foreign currency between the two dates. The Supreme Court of New South Wales in the case of *Shoreline Currencies (Aust) Pty Ltd v. Corporate Affairs Commission (NSW)* [1986] 10 ACLC 8408, held that the word "commodity" would apply to a foreign currency which was being dealt with in a commercial transaction, like for instance the sale of a currency. It would be trite law that since the respondent admitted as to the quantum of the debt, there was no necessity at all for the petitioner to first obtain a judgment before proceeding with a winding-up petition. In *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424 SC, Wan Hamzah SCJ delivering the judgment of the then Supreme Court at p. 425 had this to say:

> … the respondent company admitted that it owed the appellant a sum of $60,580 and stated that it was at all times ready and willing to pay this sum. In our judgment, as the debt of $60,580 is not disputed the respondent company is caught under section 218 (2) (a) as having neglected to pay it and is deemed to be unable to pay its debt. The amount of the admitted and unpaid debt is substantial, and it was almost half of the amount claimed by the appellant. Therefore the appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding-up or not to order it.

The Singapore Court of Appeal speaking through Rajah J in *Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v. Official Receiver And Liquidator Of Mosbert Acceptance Ltd* [1978] 1 MLJ 57 at p. 59 of the report said:

> Having regard to the clear and unequivocal admission of the petitioner's debt contained in the first letter the learned judge was entitled to come to the conclusion that there was no *bona fide* dispute.
>
> With regard to the first appellant's contention that the learned judge was wrong in finding that the company was unable to pay its debts, it is to be observed that the petition is based on the company's failure to pay or give security for the debt of which a statutory demand has been made. The law is clear and is as stated in *Buckley on the Companies Act*, 13th Edition, at page 460 as follows:
>
> > The particular indications of insolvency mentioned in paragraphs (a), (b) and (c) are all instances of commercial insolvency, that is of the company being unable to meet current demands upon it. In such a case it is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound; this is not the test. A

> company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.
>
> Accordingly, in our judgment the appeal must fail and must be dismissed with costs.

In the context of the present case, the debt incurred by the respondent was admitted and it was to the tune of RM9,457,528.70. The proposal by the respondent to pay the debt at RM40,000 per month and that the respondent would increase that monthly repayment once the "situation improves" was not acceptable to the petitioner. In my judgment, the respondent satisfied the test of commercial insolvency as alluded to in the case of *Pioneer Concrete (M) Sdn Bhd v. Celini Corp. Sdn Bhd (supra)* where at p. 149 of the report, the court aptly said:

> In my judgment, the debt incurred by the respondent to the tune of RM462,819.50 was not in dispute at all. Inability to pay debts under s. 218(1)(e) of the Companies Act 1965 is a common ground for a winding-up order. It is a correct statement of the law to say and I so say that *prima facie*, the petitioner as a creditor who is not paid has a right to file a petition for winding-up, whatever the motives may be. The court is not concerned about the motives of the petitioner here in winding-up the respondent (*Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95). It is germane to mention that the test of commercial insolvency is simple. It is this. Whether the company is unable to meet its current debts as they fall due? A company may have substantial wealth which cannot be realized immediately and if that happens the company is said to be unable to pay its debts within the purview and ambit of s. 218(1)(e) of the Companies Act 1965 and this is so even though on liquidation the company will be able to meet all its liabilities: *Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v. Official Receiver and Liquidator of Mosbert Acceptance Ltd* [1978] 1 MLJ 57; *Wei Giap Construction Co (Pte) Ltd v. Intraco Ltd* [1979] 2 MLJ 4; *Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd* [1980] 2 MLJ 53; *Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21; *MBf Finance Bhd v. Sri Hartamas Development Sdn Bhd* [1992] 1 CLJ 160 at p. 169; *Lian Keow Sdn Bhd (in liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 at p. 454 and *PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd* [1995] 1 MLJ 21 at p. 29.

It was no defence for the respondent to say that they would be able "to recover the losses in a few years time" (see the letter of admission in exh. E of encl. 13 at p. 42 thereof as reproduced earlier). There was no

affidavit evidence emanating from the respondent to show that the respondent was really solvent and was able to pay its colossal debts. The burden would be on the respondent to prove its ability to pay the debts. In *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1992] 1 CLJ 637 SC, Gunn Chit Tuan SCJ delivering the judgment of the Supreme Court succinctly remarked at pp. 641-642 of the report:

> In this case, the presumption of insolvency arises when the requirements of s. 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. In dealing with 'commercial insolvency', that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the *Malayan Plant* case [1980] 2 MLJ 53 and cite the following observations from *Buckley on the Companies Act* (13th Ed) at p. 460:
>
> In such a case it is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.
>
> Applying the test in the above-quoted observations, we therefore held that the learned judge had exercised his discretion correctly in ordering the appellant to be wound up.

In *Pt Anekapangan Dwitama v. Far East Food Industries Sdn Bhd* [1994] 3 AMR 50: 2682, Richard Talalla J at p. 2690 to p. 2691 said:

> In the Supreme Court case of *Lian Keow Sdn Bhd & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 at p 454 Seah SCJ speaking in regard to the meaning of the words 'unable to pay its debts':
>
> The meaning of the words 'a person unable to pay his debt as they became due from his own money' in s. 53(1) of the Bankruptcy Act 1967 (as amended) was considered by me in the unreported case of *In Re Chong Khian (Bankrupt)*. After referring to some passages in the *Australian cases of Bank of Australasia v. Hall* (at pp 1528 and 1543) and *Rees v. Bank of New South Wales* (at pp 218 and 230) I held that the question whether a debtor was solvent at a particular time was a question of fact. I also made the following observations:
>
> The question is not whether the debtor would be able, if time were given to him, to pay his debts out of his assets, but whether he is presently able to do so with moneys actually available …
>
> and

> If … the debtor's position is such that he has property … which if realised would produce sufficient money to pay all his indebtedness, and if that property is in such a position as to title and otherwise that it could be realised in time to meet the indebtedness as the claims mature … he cannot be said to be unable to pay his debts as they become due from his own moneys … .
>
> In short, the question is not whether the debtor's assets exceed his liabilities as appeared in the books of the debtor, but whether there are moneys presently available to the debtor, or which he is able to realised in time to meet the debts as they become due. It is not sufficient that the assets might be realisable at some future date after the debts have become due and payable.
>
> The presumption having arisen the onus is on the company to show that it was able to pay its debts. The company failed to do so. Upon a consideration of all the facts and circumstances of this application I find that the petitioner has made out a *prima facie* case as aforesaid.

Incidentally it would be ideal to recall that Mr. Michael Tan Lip Yip had applied for adjournments of the hearing of the petition on three occasions. The first was on 26 June 1998 when he gave a reason that he hailed from Malacca. The second was on 2 July 1998 when he pleaded for time as he said that the matter would be referred to the Minister of Finance for the Minister's kind intervention. He too cited "compassionate reasons" as the ground for the adjournment and he stressed that "the respondent should be assisted". The third would be on 28 October 1998 when he sought for an adjournment pending the outcome of his appeal to the Honourable Prime Minister and the Minister of Finance. In the same breath, he unabashedly announced that both the Honourable Prime Minister and the Minister of Finance had responded and they both said that the matter would be referred to the recovery department. That being the case, why was there a need to wait for the outcome of the respondent's appeal to the Honourable Prime Minister and the Minister of Finance, unless, of course, the whole exercise was simply to buy more time for the respondent. The delaying tactics adopted by Mr. Michael Tan Lip Yip was orchestrated to delay the hearing of the petition in encl. 2. Here was a respondent who was unable to pay its debts and yet sought to buy time to delay the hearing of the petition. It was totally unnecessary to refer the matter to the Honourable Prime Minister and the Minister of Finance. The indebtedness of the respondent cannot be said to be an affair of the state that would warrant an intervention from the government of the day. The debt was incurred by the respondent and not by the government of the day. Pure and simple, the delaying tactics employed by the respondent must be construed

adversely against the respondent. The respondent was insolvent and was unable to pay its debts and the respondent should be wound up. Economic hardship can never relieve the respondent from paying its debts (*Re Hong Huat Realty (M) Sdn Bhd. United Asian Bank Bhd v. Hong Huat Realty (M) Sdn Bhd* [1987] 2 MLJ 502, 507).

Section 20 (1) of the Companies Act, 1965

Lest I be accused of an oversight, I must now examine the issue of the lack of capacity on the part of the respondent to enter into the "forward foreign exchange contracts". This was a red herring thrown in by the respondent to hoodwink this court. This court can readily see the wood from the trees. Section 20(1) of the Companies Act 1965 would provide the answer. As VC George J (as he then was) said in *Bumiputra Merchant Bankers Bhd v. Supreme-QBE Insurance Bhd* [1990] 2 MLJ 247, 249:

> In any event, by section 20(1) of the Companies Act 1965, no act or purported act of a company shall be invalid by reason only of the fact that the company was without capacity or power to do the act. The section abolishes the absolute effect of the *ultra vires* doctrine.

Non-compliance And No Permission

In regard to the allegation that the petitioner had not complied with the requirements of the Bank Negara Malaysia Exchange Control Regulations published in the Bank Negara Malaysia Exchange Control Notices, it was part and parcel of my judgment that there was no such breach. It must be recalled that the "forward foreign exchange contracts" were initiated by the respondent. It must also be recalled that it was not the practice of the petitioner to require the respondent to furnish documentary evidence in regard to the purchaser's confirmation before a "forward foreign exchange contracts" could be concluded with the respondent. It was the respondent who was interested in concluding the "forward foreign exchange contracts" and the petitioner should not be faulted. Put in another way, even if the "forward foreign exchange contracts" were transacted without the permission of the relevant authorities within the ambit of the Bank Negara Malaysia Exchange Control Regulations, it was an irrelevant consideration and the demand for the repayment of a debt due was not defeated by the absence of such permission. Zakaria Yatim J (as he then was) in *Re Tan Swee Hong Elaine, ex p Deutsche Bank AG (formerly known as Deutsche Bank (Asia) AG and also formerly known as European Asian Bank AG)* [1994] 3 CLJ 371, had this to say in regard to an absence of permission in the context of that case (see pp. 372-373 of the report):

Item 4(1) of the Fourth Schedule is in *pari materia* with para 4(1) of Sch IV to the Exchange Control Act 1947 of the United Kingdom. In *Contract & Trading Co (Southern) Ltd v. Barbey & Ors* [1960] AC 244; [1959] 3 All ER 846; [1960] 2 WLR 15, the House of Lords decided that para. 4 of Sch IV was apt to include an obligation arising under a bill of exchange as well as any other monetary obligations. A debt existed even though Treasury permission had not been granted, and it might not be paid without that permission. Accordingly, a debt under a bill of exchange was one to which para. 4 applied, and a claim for its recovery was not defeated by the fact that permission to pay had not been given.

The above decision of the House of Lords was followed by Eusoff Chin J in *Bank of New Zealand v. Wong Kee Tat* [1990] 2 MLJ 435 where the learned judge held that a loan transaction was not illegal and void simply because the permission of the Controller of Foreign Exchange had not been sought.

Following the decision in Contract and Trading Co, under para. 4 of the Fourth Schedule, a demand for the repayment of a debt due in the bankruptcy notice is not defeated by the fact that the permission of the Controller had not been obtained.

I have since had sight of the Exchange Control Act 1953 where an "authorised dealer" is defined as:

a person for the time being authorised by an order of the Controller to act for the purposes of the Act as an authorised dealer in relation to foreign currency. The authorised dealers are listed in Appendix I.

A "controller" under the Exchange Control Act 1953 means "the Controller of Foreign Exchange." It is interesting to note that under Appendix I of the Exchange Control Act 1953 the petitioner is described as one of the authorised dealers under item 37 thereof and this meant that the petitioner could transact the "forward foreign exchange contracts" with the respondent under the law. Moreover under s. 3 of the Exchange Control Act 1953 an authorised dealer, like the petitioner, can even deal in foreign currency with non-residents. That section reads as follows:

There are no restrictions on an authorised dealer to deal in foreign currency with a non-resident.

Even s. 5 of the Exchange Control Act 1953 gives general permission for forward purchase from non-bank residents and that section enacts as follows:

5. The Controller hereby gives permission to an authorised dealer to buy forward foreign currency from a non-bank resident against Ringgit or foreign currency held in a permitted foreign currency account, provided:

5.1 The authorised dealer is satisfied that the non-bank resident is due to receive foreign currency –

5.1.1 From a non-resident for the export of goods or services or merchanting trade; or

5.1.2 For any commodity futures contract denominated in foreign currency traded on the Kuala Lumpur Commodity Exchange (hereinafter referred to as 'KLCE').

5.2 The forward purchase is –

5.2.1 For a sum not exceeding the expected receipt from the non-resident or the amount actually traded on the KLCE; and

5.5.2 In the foreign currency to be received.

5.3 The maturity date of the forward purchase is the expected date of receipt of the foreign currency, provided –

5.3.1 For export proceeds and/or related freight/insurance charges, there is no restriction on the period of the forward contract but the maturity date of the forward contract must not be later than 6 months after the intended date of export or such longer period as may be permitted by the Controller; and

5.3.2 In all other cases, the maturity date is not later than 12 months after the date the forward purchase contract is entered into, i.e. the entire period of the forward contract does not exceed 12 months.

Basically, the respondent entered the "forward foreign exchange contracts" with the petitioner for the purpose of obtaining cover against the risk of a change in the rate of exchange applicable to a foreign currency transaction that is supposed to take place in the near future. Whether one describes this sort of contract as "forward foreign exchange contracts" or as "currency hedge contracts" is immaterial or is of no consequence. They both carry with it commercial value of great magnitude. It was held by the English Court of Appeal in the case of *Wilson, Smithett and Cope Ltd v. Terruzzi* [1976] 2 WLR 418 that an exchange contract refers to and is related to a contract where the currency of one country is exchanged for that of another.

A "forward foreign exchange contract" involves the exchange of two currencies which is to take place in the near future. In such a situation, by virtue of the contract the bank is described as agreeing to buy or to sell foreign currency at an agreed rate of exchange. This brings into sharp

focus two important terminologies. The first would be the "forward selling contract" wherein the bank would agree to deliver to its customer a certain sum of money of a specified foreign currency on a specified fixed date, or during a certain schedule of time, and that sum of money would be at the rate of exchange fixed by the parties at the time the contract is made. An example would be where a New Zealander importer of goods priced in United States dollars desires to fix the amount of the New Zealand currency that will have to be paid. The delivery date of the contract would be scheduled at or approximately at the time the payment becomes due. It is here that the customer's obligation is simply to take the foreign currency and to pay the bank the New Zealand currency equivalent at the time of taking. The second important terminology to consider would be a "forward buying contract" which essentially means that the bank agrees to buy a specified sum of money in a particular currency for delivery on a fixed date or at a scheduled period of time and at an exchange rate fixed by the parties at the point of time when the agreement is entered.

In a book entitled *"Commercial Bank Management: Functions and Objectives"*, 3rd edn by RD De Lucia and J Peters, a 1993 publication, the learned authors at p. 176 of the book under category of "Forward Foreign Exchange Markets" succinctly said:

> Often, the underlying physical position a price taker wishes to hedge is known well in advance of the need to deliver the foreign currency. Of course, the price taker would convert into the foreign currency immediately (referred to as a `spot' transaction) then invest the foreign currency until it is required. However, individual price takers cannot achieve this aim as efficiently as banks because banks can obtain economies of scale through aggregating individual requirements.
>
> Accordingly, banks/market makers not only quote buy/sell prices for spot transactions but also provide prices on forward delivery of a currency. In pricing this forward quote, price makers employ the covered interest parity theorem which states that the difference between domestic and overseas interest rates is reflected in the cost of forward cover.

At p. 178 of the same book, the learned authors continued to say in the context of "credit exposure in dealing with foreign exchange":

> As a foreign exchange transaction, by its very nature, is an exchange of two currencies and where the domicile of the currencies are in different time zones, a significant credit risk arises at settlement. Until settlement, the risk is only the cost of a change in market prices which should represent only a small proportion of the face value of the transaction. However, the bank is exposed to the full face value at settlement ie, a bank may pay one currency in its time zone and never receive the other currency because

a

> the counterparty has defaulted in a latter time zone. Such defaults have occurred where settlements made in Asian time zones have been defaulted upon by a subsequent collapse of a bank. Of course, this risk, while not amplified by amount, is increased with forward contracts as the counterparty's credit standing may deteriorate in this period.

b

> For these reasons, it is appropriate to establish a series of credit controls to ensure the bank is not overly exposed to either the replacement or settlement risk from dealing with foreign exchange counterparties.

In my considered view, "forward foreign exchange contracts" are here to stay and it would be governed by the ordinary rules of contract law. There c must be reciprocal promises on the part of the bank while the customer will furnish the necessary valuable consideration thereto. In the context of the present case, there was in existence a legally valid and binding "forward foreign exchange contracts", and when the respondent cancelled the forex contracts, the respondent must be held accountable to it. The d petitioner sustained foreign exchange losses when the respondent cancelled the forex contracts. A debt is due and subsisting and the respondent being insolvent was unable to pay that debt. The best solution would be to wind up the respondent.

e On the question of a hedge contract, I need to refer to the decision of Rogers J in *Lloyd v. Citicorp Australia Ltd* [1986] 11 NSWLR 286 where his Lordship at p. 296 aptly described the subject matter in these salient words:

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> A hedge contract is a non-deliverable forward exchange contract. The two parties to the contract agree to settle wsith each other to the extent of any change which occurs between, say, the United States dollar and Australian dollar exchange rate agreed on the day of the agreement, and a rate set on a future specified date, the settlement date. Settlement is in Australian dollars.

g The subject matter is indeed interesting and it could go on *ad infinitum.* I must now revert to the petition in encl. 2. I gave orders in terms of encl. 2, prayer 8, paras. (a), (b), and (c) thereto without any hesitation whatsoever.

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